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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No.

AARON MARK ZIMMERMAN,

Plaintiff-Petitioner,

-vs.-

GRIEVANCE COMMITTEE OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF NEW YORK; MICHAEL F. DILLON, JOHN J. CALLAHAN, JAMES H. DOERR, M. DOLORES DENMAN, EMMETT J. SCHNEPP, STEWART F. HANCOCK, JR., RICHARD D. SIMONS And REID S. MOULE, All Individually And Jointly In Their Capacities As Justices Of The Appellate Division Of The Supreme Court Of The State Of New York, Fourth Judicial Department; THE ONONDAGA COUNTY BAR ASSOCIATION; And THE NEW YORK STATE BAR ASSOCIATION,

Defendants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Did the Appellate Division of the New York State Supreme Court, Fourth Department in *Matter Of Zimmerman* promulgate a new advertising rule prohibiting or restricting participation by attorneys in the grouped-by-practice listing of the telephone directory yellow pages?

2. Does the District Court have jurisdiction to entertain petitioner's general challenge to the constitutionality of the advertising rule promulgated in *Matter Of Zimmerman*?

3. Does the District Court have jurisdiction to entertain the petitioner's general challenge to the constitutionality of the Appellate Division's method of promulgating advertising rules?

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Defendants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Aaron Mark Zimmerman respectfully requests that a writ of certiorari issue to review the judgment and the opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on January 27, 1984.

OPINION BELOW

The opinion of the Court of Appeals and the opinion of the United States District Court (Northern District of New York) appear in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on January 27, 1984. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did the Appellate Division of the New York State Supreme Court, Fourth Department in *Matter Of Zimmerman* promulgate a new advertising rule prohibiting or restricting participation by attorneys in the grouped-by-practice listing of the telephone directory yellow pages?

2. Does the District Court have jurisdiction to entertain petitioner's general challenge to the constitutionality of the advertising rule promulgated in *Matter Of Zimmermon*?

3. Does the District Court have jurisdiction to entertain the petitioner's general challenge to the constitutionality of the Appellate Division's method of promulgating advertising rules?

STATEMENT OF THE CASE

SUMMARY

Aaron Zimmerman is an attorney who desires to utilize professional advertising to the extent permitted by the holdings of this Court in *Bates v. State Bar Of Arizona*, 433 U.S. 350, 97 S. Ct. 2691 (1977) and *In The Matter Of R.M.J.*, 445 U. S. 191, 102 S. Ct. 929, (1982).

In 1981, the New York State Appellate Division of Supreme Court, Fourth Department, censured Zimmerman for purchasing listings in the grouped-by-practice section of the telephone directory yellow pages. *Matter Of Zimmerman*, 79 AD 2d 263 (Fourth Department, 1981); appeal dismissed 53 N.Y. 2d 937, (1981); motion for leave to appeal denied, 54 N.Y. 2d 606 (1981).

Zimmerman later commenced an action in the District Court for the Northern District of New York pursuant to 42 U.S.C. §1983, 28 U.S.C. §1331, 28 U.S.C. §1343(3) & (4) and 28 U.S.C. §2201-2202.

Zimmerman asserts that in *Matter Of Zimmerman*, the Appellate Division established a new advertising rule that participation in the grouped-by-practice listings is unprofessional conduct because it implies certification as a specialist.

The basis of this assertion is that *Matter Of Zimmerman* contains specific language applicable to all attorneys, not merely Zimmerman:

> (T)he advertisement together with the description of the various categories of law, however, may leave the public with the erroneous impression that some lawyers are certified as specialists or that certification is available . . . The advertisement is manifestly framed to convey the impression that the advertising lawyers have a special expertise in the area of law in which their name is listed.

Matter Of Zimmerman, supra, p. 265 (Emphasis added).

This language looks "to the future" and changes "existing conditions by making a new rule to be applied thereafter to all or some part of those subject" to the Appellate Division's jurisdiction. *D.C. Court Of Appeals v. Feldman*, 103 S. Ct. 1303, 1313 (1983); citing *Prentis v. Atlantic Coast Line*, 211 U. S. 226, 29 S. Ct. 69.

Even under the Court of Appeals' interpretation of *Matter Of Zimmerman*, a rule was enunciated requiring "experience" as a prerequisite for participation in the grouped-by-practice listings.

The Court of Appeals raised the question whether a "rule" may be promulgated as part of an adjudicatory proceeding. Petitioner submits that any realistic appraisal would answer this question in the affirmative. Thus, the District Court has jurisdiction to entertain Zimmerman's general challenge to the constitutionality of the rule (or rules) promulgated in *Matter Of Zimmerman*.

Moreover, the District Court has jurisdiction to entertain Zimmerman's general challenge to the method by which the Appellate Division promulgates advertising rules. *D.C. Court Of Appeals v. Feldman, supra.*

A. INITIATION OF DISCIPLINARY PROCEEDINGS AGAINST ZIMMERMAN FOR PARTICIPATING IN THE GROUPED-BY-PRACTICE LISTINGS OF THE YELLOW PAGES.

In the autumn of 1979, Zimmerman purchased a listing in most of the "areas of practice" available in the "Lawyers Grouped-By-Practice" section of the Syracuse, New York, telephone directory yellow pages. He was one of approximately two dozen attorneys who participated in the Syracuse Listings.

A disclaimer was published along with the grouped-by-practice listings stating:

> Lawyers listing areas of practice in the Yellow Pages have not necessarily been certified by any state or federal authority as having any more competence in these areas as any other lawyers.

Disciplinary proceedings were initiated against Zimmerman by the State Office of Grievance Committees after a written inquiry by the President of the Onondaga County Bar Association. As a result,

Zimmerman was censured by the Appellate Division. *Matter Of Zimmerman, supra* .[1]

B. THE METHOD BY WHICH THE APPELLATE DIVISION REGULATES ATTORNEY ADVERTISING.

The Appellate Division has promulgated a general standard with respect to professional advertising, the essence of which is to proscribe "false", "misleading" or "deceptive" advertising. 22 N. Y. C. R. R. 1022.16(a).

The Appellate Division refuses to render formal advisory opinions and has instructed the staff of the Office of Grievance Committees not to render informal advisories. Rather, the Appellate Division relies on the adjudicatory process in "test cases" to formulate professional advertising guidelines.

Indeed, subsequent to his censure, Zimmerman submitted proposed advertisements to the Office of Grievance Committees to ascertain if they were in conformance with the general standard. At first, the Office of Grievance Committees provided him with such guidance. Then, the Office of Grievance Committees reversed itself and informed Zimmerman that it had been directed by the Appellate Division not to render "advisory opinions".[2]

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1 Petitioner takes exception to the Court of Appeals suggestion that the censure resulted, in part, from the alphabetical placement by his first name. This charge was dismissed.

2 The Appellate Division has adopted the Code of Professional Responsibility promulgated by the New York State Bar Association. However, membership in the N Y. S. B. A. is not required and the N. Y. S. B. A. is not an official arm of the Court. While the Bar Association does issue ethics opinions, its opinions are not binding on the Court.

The Appellate Division's approach to advertising is best underscored by noting its handling of mail advertisements. These must be filed in advance with the Office of Grievance Committees. Yet, neither the Office of Grievance Committees nor the Appellate Division will render an advisory opinion as to their propriety.

In the view of the Appellate Division, all lawyers should possess "inherent" knowledge whether advertising is misleading or not. As the District Court summarized:

> The Appellate Division upheld the disciplinary rule as formulated; it found that the purpose and meaning of the rule should be clear to any attorney who must make a judgment whether a particular form of advertising would be deceitful.

Actually, the Appellate Division's presumption with respect to lawyers' insight is highly unrealistic. If advertising propriety is so obvious, why then has this Court had to address advertising questions on several occasions?

Moreover, the states in which Zimmerman is admitted are at odds over the propriety of grouped-by-practice advertising. Florida, to cite an instance, apparently permits the type of advertising for which Zimmerman was censured.[3]

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3 "It is not improper for lawyers to list their names under areas of practice in which they are neither designated nor certified as long as the listing does not utilize the terms 'designated in', 'certified in' or 'qualified in' . . . Thus lawyers may list areas of practice in the yellow pages regardless of experience or educational background." "Ethics", The Florida Bar News, December, 15, 1983, p.2.

These divergent views by the various states underscore the fallacy of the New York view that lawyers should possess "inherent" knowledge of what constitutes acceptable commercial free speech.

Notwithstanding the Appellate Division's attitude, circumstances dictate that from time to time the Appellate Division has to establish specific advertising guidelines. Since the Appellate Division does not render advisory ethics opinions, guidelines for all attorneys are established by adjudicating the propriety of advertisements placed by individual attorneys. This is precisely what occurred in *Matter Of Zimmerman.*

C. THE RULE PROMULGATED BY *MATTER OF ZIMMERMAN* THAT PARTICIPATION IN THE GROUPED-BY-PRACTICE LISTINGS IS IMPROPER BECAUSE IT IMPLIES SPECIALIST STATUS.

For the language in *Matter Of Zimmerman* to be accurately characterized as a "rule", it must (a) "loo(k) to the future", (b) "chang(e) existing conditions" and (c) "be applied thereafter to all" attorneys. *D.C. Court Of Appeals v. Feldman, supra,* 1313.

Concededly, *Matter Of Zimmerman* is not a model of clarity. The Appellate Division cited both a lack of experience and the implication conveyed of "specialist" status in support of its determination that the listings were misleading.

It is clear, however, that *Matter Of Zimmerman* did look to the future; did change existing conditions; and is applicable to all attorneys.

When the Appellate Division addressed the matter of "specialist" status, the Court referred to <u>all of the lawyers in the listings, not merely Zimmerman</u>:

> (T)he advertisement together with the description of the various categories of law, however, may leave the public with the erroneous impression that some <u>lawyers</u> are <u>certified as specialists</u> or

> that certification is available . . . The advertisement is manifestly framed to convey the impression that the advertising lawyers have a special expertise in the area of law in which their name is listed.

Matter Of Zimmerman, supra, p. 265, (Emphasis added).[4]

The Appellate Division's statement in *Matter Of Zimmerman* reflects the fact that in New York, it is, per se, improper for an attorney to hold himself or herself out to the public as being a "specialist". [See Opinion #487, Committee On Professional Ethics, New York State Bar Association (July 10, 1978)].

Thus, by virtue of the Appellate Division's statement every attorney listed in the grouped-by-practice listings could thereafter by subject to disciplinary action.

The conclusion is, therefore, inescapable that by its holding in *Matter Of Zimmerman, supra,* the Appellate Division established a new advertising rule that participation in the grouped-by-practice listings is per se misleading because it implies "specialist" status.

D. AT THE VERY LEAST, *MATTER OF ZIMMERMAN* ESTABLISHED A RULE REQUIRING "EXPERIENCE" TO PARTICIPATE IN THE GROUPED-BY-PRACTICE LISTINGS.

The Second Circuit Court of Appeals refused to adopt the petitioner's line of analysis contending that *Matter Of Zimmerman* promulgated a rule applicable to all lawyers prohibiting participation in the

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4 The District Court itself characterized the grouped-by-practice listings as: ". . . 25 areas of specialization for lawyers." (Emphasis added)

grouped-by-practice listings because they implied certification as a specialist. However, at the very same time the Court of Appeals noted:

> The Court censured Zimmerman because he listed himself under categories for which he lacked experience . . .

Given the Appellate Division's "test case" procedure, even under this interpretation *Matter Of Zimmerman* established an advertising rule: A lawyer must be "experienced" to participate in the listings.

Either way, *Matter Of Zimmerman* looked to the future conduct of all attorneys. As such, it may be characterized as a "rule" and its constitutionality is open to challenge in the District Court.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE COURT OF APPEALS HAS MISCONSTRUED AND MISAPPLIED THE HOLDING OF THIS COURT IN *D.C. COURT OF APPEALS* v. *FELDMAN*, AND RAISES SIGNIFICANT ISSUES WITH RESPECT TO DISTRICT COURT JURISDICTION IN ATTORNEY CONDUCT CASES.

This Court has already established that the district courts may entertain general challenges to rules promulgated by state courts regarding attorney conduct. *Supreme Court Of Virginia* v. *Consumers Union*, 446 U.S. 719, 100 S. Ct. 1967 (1980); *D.C. Court Of Appeals* v. *Feldman*, *supra*.

The petitioner contends that your holdings in *Consumers Union*, *supra* and *Feldman*, *supra* are equally applicable to the situation in which a state court promulgates a rule regarding conduct through the adjudicatory process. This must be so if attorneys in jurisdictions which utilize New York's "test case" approach are not to be foreclosed from the avenue of relief accorded by *Feldman*.

The Court of Appeals alluded to this issue, but saw no need to resolve it:

> It is possible that a state court could combine in a single opinion an adjudication of a grievance complaint with a promulgation of what amounts to a new rule . . . (I)f . . . the Appellate Division . . . had gone on to annouce a prohibition of any grouped-by-practice listing, we would have to determine whether *Feldman* permits a district court challenge to such a claimed 'promulgation' of a new rule.

The Court of Appeals avoided this threshold issue by imposing the additional requirement not mandated by *Feldman* that the pronouncement of the state court be rendered with crystal clarity:

> It would be inconsistent with the thrust of *Feldman* to resolve ambiguities in a state court opinion in favor of the 'promulgation' of a 'new' rule and thereby encounter a jurisdictional issue in the absence of a clear statement from the state court.

This is an erroneous interpretation of *Feldman*. There is no reason why the attorney making the challenge should be foreclosed from relief simply because the state court's statement lacks total clarity.

The language contained in *Matter Of Zimmerman* possesses all the attributes of a "rule": it looks to the future; it changes existing conditions; and it is applicable to all attorneys. *D.C. Court Of Appeals v. Feldman, supra*, p. 1313.

For the Court of Appeals' analysis to be sustained, it must be demonstrated that the Appellate Division merely investigated, declared and enforced "liabilities as they stood on present or past facts and under laws supposed already to exist". *D.C. Court Of Appeals v. Feldman, supra*, p. 1313.

This was clearly not the case in *Matter of Zimmerman*.

Any fair reading must lead to the conclusion that *Matter Of Zimmerman* imposed new limitations on attorney advertising by restricting - if not prohibiting - participation by all attorneys in the grouped-by-practice listings. These limitations may be challenged by Zimmerman or any other attorney under your holding in *Feldman.*

Moreover, the Court of Appeals ignored the petitioner's challenge to the method by which the Appellate Division promulgates advertising guidelines. *Feldman* certainly does not foreclose such a constitutional challenge.

The utilization of "test cases" by the Appellate Division to establish advertising guidelines results in a (1) chilling effect upon advertising; (2) an unfair selective enforcement against individual attorneys and (3) an unconstitutional ex post facto application of rules. The District Court has jurisdiction to entertain a general challenge to the constitutionality of this method by which the Appellate Division establishes advertising guidelines.

These are all significant issues meriting the attention of this Court.

2. THE DECISION OF THE COURT OF APPEALS INVOLVES AN IMPORTANT CONSTITUTIONAL ISSUE.

The decision below has foreclosed the petitioner from challenging the advertising restrictions promulgated by *Matter Of Zimmerman* as they apply to his future advertising and that of other attorneys.

Matter Of Zimmerman cannot stand constitutional muster in light of the subsequent holding of this Court in *Matter Of R.M.J., supra.*

An attorney need not be "experienced" or a "specialist" to advertise that he or she will accept a case in certain areas of practice. The attorney need only be

"competent". This is the essence of your holding in *Matter Of R.M.J., supra,* p. 937:

> The states may not place an absolute prohibition on certain types of potentially misleading information, e.g. a listing of areas of practice, if the information also may be presented in a way that is not deceptive. Thus the Court in *Bates* suggested that the remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation. (Emphasis added)

Whether premised on the "experience" theory or the "specialist-status" theory, the restrictions promulgated by *Matter Of Zimmerman* are facially unconstitutional.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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APPENDIX

A1

Decision of The Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

FEB - 6 1984

No. 455—August Term, 1983

Argued: January 5, 1984 Decided: January 27, 1984

Docket No. 83-7532

AARON MARK ZIMMERMAN,

Plaintiff-Appellant,

—v.—

GRIEVANCE COMMITTEE OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF NEW YORK, ET AL.,

Defendant-Appellee.

Before:

NEWMAN and PRATT, *Circuit Judges*, and MACMAHON, *District Judge.**

* The Honorable Lloyd F. MacMahon of the United States District Court for the Southern District of New York, sitting by designation.

Appeal from a judgment of the District Court for the Western District of New York (Neal McCurn, Judge) dismissing for lack of subject matter jurisdiction a suit challenging a state court's censure of a lawyer and construction of a Disciplinary Rule of the Code of Professional Responsibility barring deceptive and misleading lawyer advertising.

Affirmed.

GARY LAVINE, Syracuse, N.Y. (Aaron Mark Zimmerman, *pro se*, Syracuse, N.Y., Mark Bennett, Allen, Babisch & Bennett, Des Moines, Iowa, on the brief), *for plaintiff-appellant.*

WILLIAM J. KOGAN, Asst. Solicitor General, Albany, N.Y. (Robert Abrams, Attorney General, and Peter H. Schiff, Albany, N.Y., on the brief), *for defendant-appellee Grievance Committee of the Fifth Judicial District.*

JOHN A. WILLIAMSON, JR., Albany, N.Y., *for defendant-appellee New York State Bar Association.*

HENRY S. FRASER, Syracuse, N.Y. (Coulter, Fraser, Ames, Bolton, Bird & Ventre, Syracuse, N.Y., on the brief), *for defendant-appellee Onondaga County Bar Association.*

NEWMAN, *Circuit Judge*:

Aaron Mark Zimmerman appeals from the June 13, 1983, judgment of the District Court for the Western District of New York (Neal McCurn, Judge) dismissing his amended complaint for lack of subject matter jurisdiction. The complaint alleged that Zimmerman's First Amendment rights were violated by a decision of the Appellate Division of the New York Supreme Court, which censured him for violating a State rule regulating lawyer advertising. We affirm.

Zimmerman, an attorney admitted to practice in New York, purchased listings in the attorneys' section of the Syracuse, New York, *Yellow Pages*. His name, arranged alphabetically by his first name, rather than by his surname, appeared in all of the twenty-five available areas of practice listed under a general caption "LAWYERS Grouped By Practice." Among the areas in which Zimmerman was listed were "Admiralty Law," "Bankruptcy," "Labor Law," and "Securities Law."

The Grievance Committee of New York's Fifth Judicial District instituted disciplinary proceedings against Zimmerman before the Appellate Division of the Supreme Court of the State of New York, Fourth Judicial Department. The Committee alleged that Zimmerman had violated the advertising rule in 11 N.Y.C.R.R. § 1022.16(a), which adopts DR 2-101(A) of the Disciplinary Rules of the Code of Professional Responsibility.[1] The Appellate Division issued a decision and order censuring Zimmerman for professional misconduct. *In re Zimmerman*, 79

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[1] The rule provides: "A lawyer on behalf of himself or herself or partners or associates, shall not use or disseminate or participate in the preparation or dissemination of any public communication containing statements or claims that are false, deceptive, misleading or cast reflection on the legal profession as a whole."

A.D.2d 263, 438 N.Y.S.2d 400 (4th Dep't 1981) (per curiam). Zimmerman's appeal to the New York Court of Appeals was dismissed. 53 N.Y.2d 937, 440 N.Y.S. 2d 1029 (1981), and a subsequent motion for leave to appeal was denied, 54 N.Y.2d 606, 443 N.Y.S.2d 1029 (1981). Zimmerman did not seek review in the United States Supreme Court, but instead instituted the present action in federal district court, purporting to plead various claims under 42 U.S.C. § 1983 (Supp. V 1981).

We agree with the District Court's determination that *District of Columbia Court of Appeals v. Feldman*, 103 S. Ct. 1303 (1983), requires dismissal of Zimmerman's amended complaint for lack of subject matter jurisdiction. *Feldman* held that a federal court lacks subject matter jurisdiction over claims that an unsuccessful state bar applicant was subjected to an unconstitutional application of state bar admission rules in a state judicial proceeding. *Id.* at 1311-15. The only permissible federal court challenge is review in the United States Supreme Court. 28 U.S.C. § 1257 (1976). The decision in *Feldman* clearly applies to federal district court challenges to attorney disciplinary orders rendered by state courts in judicial proceedings. *See* 103 S. Ct. at 1314 n.15; *id.* at 1315-16 n.16 (citing *MacKay v. Nesbett*, 412 F.2d 846 (9th Cir. 1969)). Disciplinary proceedings before the New York Appellate Division are judicial in nature, *Erdmann v. Stevens*, 458 F.2d 1205, 1208-09 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972), and dismissal of an appeal from a disciplinary proceeding by the New York Court of Appeals is a final state court judgment. *See Turco v. Monroe County Bar Association*, 554 F.2d 515, 521 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977).

Apparently recognizing that *Feldman* precludes a district court challenge to the censure itself, Zimmerman

endeavors on appeal to broaden his challenge to include what he claims is "a general attack upon the constitutionality of the rule." Appellant's Brief at 7. *Feldman* recognized a distinction between "challenges to state court decisions in particular cases arising out of judicial proceedings," over which district courts lack jurisdiction, and "general challenges to state bar rules, promulgated by state courts in non-judicial proceedings," as to which district court jurisdiction exists. 103 S. Ct. at 1317. And the Supreme Court acknowledged in *Feldman* that a state court may be found to have acted in a non-judicial capacity in promulgating rules regulating the bar. *Id.* at 1316; *see, e.g., Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 731 (1980). It is possible that a state court could combine in a single opinion an adjudication of a grievance complaint with a promulgation of what amounts to a new rule. Of course, every application of a rule to the facts of a particular case results in some "new" refinement of the rule, and *Feldman* cannot be circumvented by characterizing all constructions of a rule as the promulgation of new rules. Thus, when Zimmerman challenges the Appellate Division's decision because it construed the advertising rule's ban on "deceptive" and "misleading" statements to bar any listings under categories in which a lawyer is not experienced, he is complaining about a construction of the rule given in an adjudication of the grievance against him, and *Feldman* limits his challenge of that adjudication to review in the Supreme Court. However, if, as Zimmerman contends, the Appellate Division, after finding Zimmerman's listings to be deceptive because they implied experience that he lacked, had gone on to announce a prohibition on any grouped-by-practice listing, we would have to determine

whether *Feldman* permits a district court challenge to such a claimed "promulgation" of a "new" rule.

We need not resolve that issue in this case, however, because the Appellate Division has not unambiguously prohibited grouped-by-practice listings. The Court's opinion only raises the concern that listing by categories of law "*may* leave the public with the erroneous impression that some lawyers, including those listed in the advertisement, are certified as specialists" and notes that "no lawyer certifications procedure or rules have been established in New York." 438 N.Y.S.2d at 402 (emphasis added). But the opinion stops short of announcing a prohibition on grouped-by-practice listing. The Court censured Zimmerman because he listed himself under categories for which he lacked experience, not because of a listing *per se*. The Assistant Solicitor General of New York, representing the Grievance Committee, eschews any contention that grouped-by-practice listings have been prohibited. It would be inconsistent with the thrust of *Feldman* to resolve ambiguities in a state court opinion in favor of the "promulgation" of a "new" rule and thereby encounter a jurisdictional issue in the absence of a clear statement from the state court.

Affirmed.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

AARON MARK ZIMMERMAN,

Plaintiff,

-vs.-

GRIEVANCE COMMITTEE OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF NEW YORK; MICHAEL F. DILLON, JOHN J. CALLAHAN, JAMES H. DOERR, M. DOLORES DENMAN, EMMETT J. SCHNEPP, STEWART F. HANCOCK, JR., RICHARD D. SIMONS, AND REID S. MOULE, ALL INDIVIDUALLY AND JOINTLY IN THEIR CAPACITIES AS JUSTICES OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FOURTH JUDICIAL DEPARTMENT; THE ONONDAGA COUNTY BAR ASSOCIATION; AND THE NEW YORK STATE BAR ASSOCIATION,

Defendants.

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MEMORANDUM-DECISION & ORDER

Plaintiff Aaron Mark Zimmerman brought this action pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1331. Plaintiff seeks declaratory and injunctive relief from the decision of the Supreme Court of the State of New York, Appellate Division, Fourth Department to censure him for violation of the relevant rule regarding attorney advertising, DR 2-101(A) of the Disciplinary Rules of the Code of Professional Responsibility, adopted by New York at 22 N.Y.C.R.R. § 1022.16(a).

Before the Court is defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b) on the grounds that the amended complaint fails to state a claim upon which relief can be granted and that the Court lacks subject matter jurisdiction. The Court grants defendants' motion pursuant to Rule 12(b) (1) on the basis that jurisdiction does not lie in a federal district court, for the reasons set forth below.

BACKGROUND

Plaintiff Zimmerman was admitted to the New York bar in 1977. In 1979, he caused his name to be listed in the New York Telephone yellow pages directory for the Syracuse area under each of the available 25 areas of specialization for lawyers. His name was arranged alphabetically by his first name, rather than by his surname. Under the caption "Lawyers Grouped by Practice" was the following disclaimer: "Lawyers listing areas of practice in the yellow pages have not necessarily been certified by any State or Federal authorities as having any more competence in these areas than any other lawyers."

As a result of this advertising, the New York Fifth Judicial District's Grievance Committee instituted disciplinary proceedings against Zimmerman before the Fourth Department. It was the Committee's position that Zimmerman had violated the advertising rule found at 22 N.Y.C.R.R. 1022.16(a). The rule provides:

> A lawyer on behalf of himself or herself or partners or associates, shall not use or disseminate or participate in the preparation of any public communication containing statements or claims that are false, deceptive, misleading or cast reflection on the legal profession as a whole.

The Fourth Department considered the contentions of Zimmerman that he had no intention to deceive when he advertised in the manner that he did and that the disciplinary rule was vague and overbroad. The court found that Zimmerman's advertising was not protected speech because of its capacity to deceive, holding that it did not "disclose information to permit a consumer to reach an informed decision." *Zimmerman v. Office of Grievance Committees,* 79 A.D.2d 263, 265, 438 N.Y.S.2d 400, 402 (4th Dep't 1981), *appeal dismissed,* 53 N.Y.2d 937, 440 N.Y.S.2d 1029 (1982). Further, the Appellate Division upheld the disciplinary rule as formulated; it found that the purpose and meaning of the rule should be clear to any attorney

who must make a judgment as to whether a particular form of advertising would be deceitful. Zimmerman was therefore censured for using deceptive and misleading advertising. *Id.* at 266, 438 N.Y.S.2d at 403.

Zimmerman's appeal to the New York Court of Appeals was dismissed. *Matter of Zimmerman*, 53 N.Y.2d 937, 440 N.Y.S.2d 1029 (1981). Thereafter, Zimmerman brought the instant action in federal district court. After defendants filed the current motions to dismiss, plaintiff filed an amended complaint. Argument of the motion was directed to the amended complaint.

DISCUSSION

In *District of Columbia Court of Appeals* v. *Feldman*, ____U.S.____, 103 S. Ct. 1030 (1983), the Supreme Court determined that a district court has no power to review a decision of the highest court of a state regarding a particular lawyer's discipline. In its opinion, the Court noted that "a United States District Court has no authority to review final judgments of a state court in judicial proceedings. Review of such judgments may be had only in [the Supreme] Court." 103 S. Ct. at 1315. See 28 U.S.C. § 1257.

Zimmerman was disciplined in a proceeding that was judicial in nature. *See District of Columbia Court of Appeals*, 103 S. Ct. at 1313. *See also, Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, ____U.S.____, 102 S. Ct. 2515, 2522 (1982) (when the state vests in its courts the power to discipline lawyers, disciplinary proceedings are judicial, not administrative or legislative); *Erdmann* v. *Stevens*, 458 F.2d 1205, 1209 (2d Cir. 1972), *cert. denied*, 409 U.S. 889 (Appellate Division "act[s] in its judicial capacity as a state court in . . . disciplinary proceedings . . . and . . . these proceedings are judicial, not administrative, in nature.") In addition, there is no question that the dismissal of Zimmerman's appeal by the New York Court of Appeals represents a final state court judgment.

See Turco v. Monroe County Bar Ass'n, 554 F.2d 521 (2d Cir. 1977).

The Supreme Court has recognized the traditional strong interest of a state to regulate the conduct of lawyers admitted to its bar. *See District of Columbia Court of Appeals*, 103 S. Ct. at 1315 n.16; *Middlesex County Ethics Comm.*, 102 S. Ct. at 2522. The rule that permits state court judgments in this area to be reviewed only by the Supreme Court "serves substantial policy interests arising from the historic relationship between state judicial systems and the members of their respective bars, and between the state and federal judicial systems." *District of Columbia Court of Appeals*, 103 S. Ct. at 1316 n.16, quoting *MacKay v. Nesbett*, 412 F.2d 846 (9th Cir. 1969).

Only when a litigant "mount[s] a general challenge to the constitutionality" of a disciplinary rule does a federal district court have jurisdiction. *District of Columbia Court of Appeals*, 103 S. Ct. at 1316. When state courts promulgate rules regarding attorney conduct, they act in a nonjudicial capacity, and hence, district courts may consider the constitutionality of those rules. *Id.* at 1317, citing *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 731, 100 S. Ct. 1967, 1974 (1980).

The Supreme Court, in distinguishing between a particularized and a generalized attack on a state bar rule, quoted a Tenth Circuit decision which stated, in pertinent part:

> There is a subtle but fundamental distinction between two types of claims which a frustrated bar applicant might bring to federal court: The first is a constitutional challenge to the state's general rules and regulations governing admission; the second is a claim, based on constitutional or other grounds, that the state has unlawfully denied a particular applicant admission. The Court held that while federal courts do exercise jurisdiction over many constitutional claims which attack the state's power

> to license attorneys involving challenges to either the rule-making authority or the administration of the rules, . . . such is not true where review of a state court's adjudication of a particular application is sought. The Court rules that the latter claim may be heard, if at all, exclusively by the Supreme Court of the United States.

District of Columbia Court of Appeals, 103 S. Ct. at 1316, quoting *Doe v. Pringle,* 550 F.2d 596, (10th Cir. 1976) (emphasis in original).

A close examination of plaintiff's amended complaint discloses that the subject matter complained of concerns a particular lawyer's discipline for violation of a rule of conduct rather than a generalized attack on the constitutionality of the rule.

Plaintiff asserts in the first, fifth, and sixth causes of action that the defendants have infringed upon his first amendment rights to engage in commercial speech through advertising; in his second cause of action that he was denied equal protection under the fourteenth amendment in that other attorneys who advertised in a similar manner were not disciplined; in his third and fourth causes of action that he was denied due process in that he was held to an unknown standard of conduct, in that the complaint was first brought to the Grievance Committee by a member of the local bar association who was biased against him, and in that the Grievance Committee failed to give him guidance on the proper manner of advertising when he requested it.

For relief, plaintiff requests a judgment declaring that the defendants' actions violated plaintiff's constitutionally protected right to advertise and an injunction preventing defendants from further violations of his first amendment rights. Clearly, what plaintiff seeks is a review of New York's final judgment that his actions deserved censure. It cannot be said that contained within the complaint is a general challenge to 22 N.Y.C.R.R. 1022.16(a).

Although Zimmerman brings this action under Title 42, Section 1983 for protection of federal constitutional rights, this court may not entertain his complaint. As stated in *District of Columbia Court of Appeals:*

> If the constitutional claims presented to a United States District Court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the District Court is in essence being called upon to review the state court decision. This the District Court may not do.

103 S. Ct. at 1315 n.16. When a plaintiff seeks review of a state court judgment that results in his discipline, even when he asserts violations of federal rights, his appeal may be only to the Supreme Court. *Id.* at 1317. Zimmerman's allegations that the judgment in state court resulted in constitutional deprivations are bound up with his assertions that he was improperly disciplined, and accordingly this court lacks jurisdiction.

Defendants' motion to dismiss is hereby granted on the basis that there is no subject matter jurisdiction. In reaching this decision, the court need not address the other basis for defendants' motion.

For the foregoing reasons, defendants' motion to dismiss plaintiff's amended complaint is granted pursuant to Fed. R. Civ. P. 12(b) (1).

IT IS SO ORDERED.

NEAL P. McCURN
Neal P. McCurn, U.S. District Judge

Dated: June 8, 1983
Syracuse, New York